

No. 76-807

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL B. GERCEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 540 F. 2d 536. The opinion of the district court (Pet. App. A8-A29) is reported at 409 F. Supp. 946.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1976. A petition for rehearing was denied September 13, 1976. The petition for a writ of certiorari was filed on December 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States can be held liable under the Suits in Admiralty Act for failure to undertake and carry out an enforcement program, institution of which is discretionary with the United States.

STATUTE INVOLVED

The relevant provisions of 46 U.S.C. 390a-390d are set forth in Pet. App. A30-A33. 46 U.S.C. 742 provides in pertinent part:

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * * .

STATEMENT

Petitioners are the parents of Steven Gercey, who drowned when the motor vessel COMET sank off Rhode Island on May 19, 1973. In this action against the United States, brought under the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741 *et seq.*,¹ petitioners alleged that the Coast Guard negligently caused their son's death by failing to prevent the voyage of an illegally operated, privately-owned vessel.

Pursuant to a federal safety program that requires the Coast Guard to inspect small passenger-carrying vessels at least once every three years (46 U.S.C. 390 *et seq.*), the Coast Guard inspected the vessel COMET on May 19, 1971, at Providence, Rhode Island (Pet. App. A9). The COMET, a 30-year-old, 49-foot wooden motor vessel, capable of carrying up to 39 passengers, failed to pass the Coast Guard

¹Petitioners brought this action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* The district court determined (Pet. App. A13-A14) that a remedy is provided petitioners under the Suits in Admiralty Act and therefore that the Federal Tort Claims Act does not apply. See 28 U.S.C. 2680(d).

inspection (Pet. App. A2). Without the certificate, the COMET could not lawfully carry six or more passengers for hire (46 U.S.C. 390c), and, if it were to do so, its owner or its master would be liable for up to \$1,000 in fines for each violation (46 U.S.C. 390d). The owner of the COMET, the University of Rhode Island, notified the Coast Guard that it did not plan to repair the vessel and that it would be placed in "wet storage" (Pet. App. A9). In September 1971, the COMET was sold to William Jackson, who proceeded to carry large groups of fee-paying passengers on it during 1972 and 1973. On May 19, 1973, a group of people, including Steven Gercey, chartered the vessel and went on a fishing trip off the coast of Rhode Island. The COMET sank approximately 45 minutes after departure. Steven Gercey, William Jackson, and 15 other passengers did not survive (Pet. App. A3, A9-A10).

Petitioners then brought this action against the United States under the Suits in Admiralty Act. They contended that after the Coast Guard revoked the vessel COMET's certificate to operate as a "passenger-carrying vessel" it negligently failed to take further positive steps to protect individuals like their son from the danger of voyaging on the vessel and that this negligence was the cause of their son's death.

The district court granted the government's motion for judgment on the pleadings. It noted that petitioners had failed to make any factual allegations that, standing alone or operating through inference, would support a conclusion that follow-up programs, such as those suggested by petitioners to the court, or other actions by the Coast Guard, would have prevented Gercey's death. It therefore concluded that petitioners had failed to allege that the government's purported negligence was the cause-in-fact of Gercey's death (Pet. App. A23-A24).

The court of appeals affirmed (Pet. App. A1-A7). The court determined that there was, in fact, sufficient evidence of causation to provide an issue for jury consideration, but it based its decision on the ground that the Suits in Admiralty Act does not waive sovereign immunity to petitioners' claim. The court noted the decision whether to institute a follow-up program to prevent utilization of decertified vessels "involves a basic policy judgment as to how the public interest may best be promoted" (Pet. App. A5), and the court concluded that the exercise of such judgment does not give rise to liability under the Suits in Admiralty Act.

DISCUSSION

The decision of the court of appeals is correct and does not warrant review by this Court.

1. The court of appeals correctly determined that Congress, in providing in 1960 that suits against the United States for those maritime torts that previously could be maintained only under the Federal Tort Claims Act would be brought under the Suits in Admiralty Act, did not intend to permit the federal courts to assume executive responsibility for reviewing basic policy "decisions concerning the public interest in maritime matters" (Pet. App. A7). The court rested this result upon its conclusion that Congress had not intended to subject the United States to suit for the exercise of "discretionary functions," which the court defined as "basic policy judgments as to the public interest" (Pet. App. A6). The result also may be supported by the separate but related consideration that the Coast Guard was under no duty to take any action with respect to decertified vessels and therefore as a matter of law its inaction was not negligent.

a. Suits brought under the Federal Tort Claims Act are subject to an exception for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). There is no indication that Congress intended, in the course of transferring certain maritime tort actions against the United States from the Federal Tort Claims Act to the Suits in Admiralty Act, to remove this exception.

The provision under which petitioners brought suit was added to the Suits in Admiralty Act in 1960 by Pub. L. 86-770, 74 Stat. 912. The purpose of the amendment was to remove the confusion concerning the respective jurisdictions of the federal district courts and the Court of Claims, confusion that was necessitating frequent transfer of cases. S. Rep. No. 1894, 86th Cong., 2d Sess. 6 (1960). The amendment provided for the first time that suits could be maintained against the United States under that Act in cases where, if a private party had been the defendant, a proceeding in admiralty could have been maintained. Prior to this amendment, while maritime tort actions arising out of federal government ownership of vessels and cargo could be maintained under the Suits in Admiralty Act, other actions against the United States for money damages for maritime torts could be brought only under the Federal Tort Claims Act. See, e.g., *Indian Towing Co. v. United States*, 350 U.S. 61.

In view of the limited purpose of the amendments, which were intended only to clarify obscurities in jurisdictional language (S. Rep. No. 1894, *supra*, at 5, 6, 10), it is reasonable to conclude that Congress did not intend to revise existing substantive law to subject the government to substantial new liability concerning the exercise of its

discretionary functions. This conclusion is supported by the absence of references in the legislative history to any imposition of new liability upon the government or to the waiver of immunity to suits based upon allegations of the improper exercise of discretionary functions.²

In the present case, the Coast Guard decision that petitioners contend was negligent unquestionably was "a basic policy making decision" (Pet. App. A7) and would be classified as an exercise of a discretionary function under the Federal Tort Claims Act. The decision involved basic policy determinations concerning whether the increased protection from some kind of follow-up program would be sufficient to warrant a diversion of such agency resources from other regulatory activities (see Pet. App. A5-A6).

b. Negligence can be found only if the alleged tortfeasor owes a duty of care to the injured party. But as the court of appeals noted, Congress has not imposed on the Coast Guard, nor has the Coast Guard assumed, a duty to devise the follow-up system that petitioners believe is required (Pet. App. A5).

It is true that a duty of care can arise if the federal government undertakes to provide a service on which the public comes to rely. *Indian Towing Co. v. United States*, *supra*. In the present case, however, the Coast Guard did not lead the public to rely on a program protecting against utilization of decertified vessels, nor did it make any other representation upon which decedent depended. Bare legal authority to conduct or not conduct any one of a number of programs, and the authority to choose between them or to choose none, does not describe a duty to petitioners upon which a claim in tort can be founded.

²If anything, Congress appears to have believed that the exception for discretionary functions in the Tort Claims Act was little more than a codification of what otherwise would have been a judicially imposed limitation. See *Dalehite v. United States*, 346 U.S. 15, 27.

2. Petitioners rest heavily upon the allegation of a conflict among the courts of appeals concerning treatment of discretionary governmental functions under the Suits in Admiralty Act. But at least for the present, that conflict is one only of words, not of deeds. The Fifth Circuit has stated in *dictum* that an exception under the Suits in Admiralty Act relating to discretionary functions should not be implied. *De Bardeleben Marine Corp. v. United States*, 451 F. 2d 140, 146 n. 15. But that statement was made in passing, in a case in which the court held that, for other reasons, the government was not subject to suit.³

³Although petitioners do not refer to this fact, the Fourth Circuit also has expressed the view that the exceptions of the Tort Claims Act, including that for discretionary functions, are not imported into the Suits in Admiralty Act. *Lane v. United States*, 529 F. 2d 175. But it cannot be said either that the Fourth Circuit would have decided this case differently from the court below or that the court below would have decided *Lane* differently from the Fourth Circuit. The issue in *Lane* was whether the United States could be held liable for the Coast Guard's failure to mark a wreck as a hazard to navigation. The court concluded that the Coast Guard had a statutory duty to exercise "care and prudence to mark submerged wrecks which constitute substantial hazards to navigation." 529 F. 2d at 179. Since no similar duty exists here (see Pet. App. A5), it cannot be said that the Fourth Circuit would have imposed liability on these facts. Moreover, the only "discretion" in *Lane* was the discretion, subject to the duty of care and prudence, to determine which wrecks "constitute real dangers to navigation." 529 F. 2d at 179. That discretion does not involve the "basic policy judgments as to the public interest" (Pet. App. A6) to which the court below would confine the "discretionary function" exception. Thus it seems relatively clear that the court of appeals here, like the Fourth Circuit, would have imposed liability on the government on the *Lane* facts. There appears, therefore, to be no conflict in result.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.